UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1997/NGO/11
30 July 1997

ENGLISH
Original: SPANISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-ninth session
Item 2 of the provisional agenda

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING POLICIES OF RACIAL DISCRIMINATION AND SEGREGATION AND OF APARTHEID, IN ALL COUNTRIES, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES: REPORT OF THE SUB-COMMISSION UNDER COMMISSION ON HUMAN RIGHTS RESOLUTION 8 (XXIII)

Written statement submitted by the American Association of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[17 July 1997]

Summary of the report on the mission to Peru by the American Association of Jurists

1. The mission had two objectives:

(a) To try to establish the circumstances of the death of Mr. Carlos Ernesto Giusti Acuña, Judge of the Supreme Court of Justice of Peru and member of the advisory board of the American Association of Jurists, during the assault on the Japanese Embassy in Lima by units of the armed forces and of other deaths that occurred on the same occasion (14 members of the guerrilla group and 2 officers of the armed forces);

(b) To investigate the attacks on the independence and stability of the Constitutional Court and the majority of its members from government circles and senior officers of the armed forces.

2. On 11-13 May 1997, Mr. José Felipe Ledur of Brazil, President of the American Association of Jurists, and Mr. Beinusz Szmukler of Argentina, chairman of its advisory board, were in Lima. They had interviews with the following persons among others:

The children of Mr. Carlos Ernesto Giusti Acuña, Judge of the Supreme Court;

Mr. Serpa, member of the Supreme Court of Justice;

Mr. Miguel Aljovín Swayne, Attorney-General of the Nation.

Consequences of the assault on the Japanese Embassy in Lima

3. It should be noted that Mr. Giusti Acuña was someone who had been involved for a long time in the defence of human rights. Some years ago, during the Pinochet dictatorship, he undertook an observer mission to Chile on behalf of the American Association of Jurists, together with Mr. Szmukler.

4. It was impossible to establish the circumstances of his death, since even his children said they did not know whether an autopsy had been performed on their father's body. The Procurator-General of the Nation himself admitted that he did not know whether an investigation had been instituted into the events that occurred during the assault on the Embassy, whether a government procurator of lower rank was conducting an investigation, or whether autopsies had been carried out on the bodies of the persons who died.

5. For the same reasons, it was not possible to establish anything about the circumstances of the deaths of the two officers of the armed forces. Nevertheless, the mission heard a version (which it was unable to verify) according to which during the assault Mr. Giusti Acuña was hit by a bullet in the thigh, which caused heavy bleeding, and that he died because he was not given proper care as promptly as necessary, despite the fact that there were medical teams in the immediate area of the Embassy and a hospital very close by.

6. As regards the 14 members of the guerrilla group MRTA, all of whom died, it was possible to establish that the bodies of only 3 of them were handed over to their families, in closed coffins, which prevented any autopsies from being carried out. The other 11 were buried clandestinely, and their families are being denied information on where they were buried. Various sources insist that members of the guerrilla group who surrendered were summarily executed.

7. Among the hostages who were rescued, there were 30 who were wounded, almost all of them lightly, except Dr. Serpa, a member of the Supreme Court, whom the American Association of Jurists mission visited in the military hospital. At the time of the mission, he was in intensive care with stomach burns. He had already had one operation and was due to have another. The silence that has surrounded the case of Dr. Serpa is noteworthy.

8. The tunnel through which the assault on the Embassy was carried out was dug by 24 miners, who have since disappeared.

9. In conclusion, the results of the mission from this standpoint were very limited, since the persons interviewed seemed to be extremely frightened and preferred not to speak about the matter. Everything indicates that none of the measures that are required in such cases have been taken, and first of all judicial intervention to determine what actually occurred and who was responsible.

10. We cannot but note the fact that in the assault on the Embassy the only one of the hostages in the building to die and the only one to be seriously wounded had in common the fact that they were members of the Supreme Court of Justice of Peru.

Pressures and attacks on the Constitutional Court

11. Article 112 of the Peruvian Constitution states that the "President may be re-elected immediately for one more term. After a minimum of one further constitutional term has elapsed, the former President may again stand as a candidate, subject to the same conditions".

12. This rule prevents the present President, Mr. Fujimori, from standing for a new term in the next presidential elections, since he has already been re-elected once. However, the majority he has in the Congress has passed a law, No. 26657, under which:

> "The proper interpretation is that the provision on re-election in article 112 of the Constitution relates and applies to presidential terms of office begun after the date of the promulgation of the constitutional text in question. Consequently, the proper interpretation is that presidential terms started before the entry into force of the Constitution are not taken into account retroactively."

This is an instrument which does not meet the conditions necessary for it to be considered a "law", since it is not general in its application (it is a rule for one single individual), and one which in addition involves a violation of the Constitution, since under the Peruvian system the power to interpret the Constitution is vested in the judiciary.

13. The Lima College of Lawyers applied to the Constitutional Court to have this law declared unconstitutional. The way in which this request was handled revealed the limitation imposed by the Congress through the law regulating the Court, which makes it impossible, in the present circumstances and with the present composition of the Court, for laws to be declared unconstitutional and paralyses the activity of the organ responsible for supervising the observance of the Constitution. The regulatory law provides that the Constitutional Court is to be composed of seven members and that six of them must vote in favour for a law to be declared unconstitutional. Two of the members of the Court are unconditional supporters of the Executive, so that it was impossible to secure the six votes necessary for a declaration of unconstitutionality.

14. The majority of the members of the Court considered, and said so in the grounds for the judgement, that the law was unconstitutional, but not having the number of votes required by the regulatory law, they opted for the exercise of generalized supervision of constitutionality, which, in their view, was a power enjoyed by all judges, and, with reference to the case in question, declared that the re-election law was inapplicable.

15. The College of Lawyers submitted a petition for clarification and the Plenum of the Court decided that a decision should be taken on this petition by the four judges who had given the judgement. They rejected the plea for clarification on the grounds that the judgement was sufficiently clear. From that point on, an extraordinary situation came into being.

16. Some time ago, Ms. Delia Revoredo, a member of the Constitutional Court, complained of the removal of court documents, attempts to pressure her and other members of the Court and other irregularities making it difficult for the Court to operate, the responsibility for which was alleged to lie with its two members who were openly government supporters, Francisco Acosta Sánchez and José García Marcelo. To examine these complaints, the Congress appointed a Commission of Investigation, which - as was to be expected, given its composition - concluded that neither the removal of documents nor the attempts to apply pressure had been substantiated. However, what is just as serious, or even more so, is that the Commission, blatantly exceeding its terms of reference, brought proceedings against Ms. Revoredo and tried to remove her from office, together with the majority of the members of the Court, for alleged usurpation of the functions of the Plenum of the Court, by having dealt with the question of the clarification without the plenary having been convened or having considered the matter, which, as has been shown, was false. This was a political manoeuvre against the majority in the Court. Even if the accusation were true, the question would be an internal matter for the Court, which could result in a decision by the Plenum declaring the rejection of the petition for clarification null and void, which would not modify the principal finding that the re-election law was inapplicable.

17. Peruvian constitutionalists have been unanimous in declaring that the proceedings instituted by the Commission of the Congress violate the constitutional provision providing that members of the Constitutional Court may not be harassed or proceeded against because of the content of their judgements.

18. One member of the Commission of Investigation confirmed that the intention was to paralyse the Court, because "the Government cannot govern with the Constitutional Court ... we are the first power in the State and we are not going to allow three persons to govern Peru" (Temas del Mundo, 15 May 1997).

19. Attempts have also been made to remove the most senior government procurator from office. The Supreme Court of Justice ruled in favour of two applications for habeas corpus. In the first decision, it ordered that a drug-trafficker should have his right to receive visits restored, which he had been deprived of for having committed the additional "offence" of declaring that he was paying $55,000 a month to the presidential adviser Wladimir Montesinos. The other habeas corpus decision ordered the suspension of proceedings in the military court against a civilian accused of having defrauded the army in the collection of insurance premiums. Both orders by the country's highest court were disobeyed. Consequently, the Procurator-General, doing his duty, indicted the military judges. General Guevara's reply was to institute criminal and constitutional actions against the procurator for "abusing his authority, exceeding his powers with infringement of the judicial function and perverting the course of justice". According to General Guevara, no application for habeas corpus can interfere with the workings of military justice.

20. Dr. Ricardo Nugent, President of the Constitutional Court, one of the country's most distinguished lawyers, has argued that if the attempt to bring proceedings against the majority of members of the Constitutional Court and remove them from office is successful, it will mean "digging the grave of the rule of law".

21. The American Association of Jurists considers that the liquidation of the rule of law is already well advanced in Peru. An attempt is now being made to eliminate the last bastions of institutional resistance: the Constitutional Court and the office of Procurator-General of the Nation.